Personal Jurisdiction Under Article 2, UCMJ Whither Russo, Catlow, and Brown?

Cpt(P) David A. Schlueter, JAGC

". . . Congress has a constitutional duty to protect military personnel from quasi-civilians moving among them with a known license to commit service-connected crimes without fear of court-martial punishment." [1]

In October 1979, Congress exercised its "constitutional duty"—its long-recognized powers of control of the armed forces.[2] It amended Article 2 the Uniform Code of Military Justice to provide for court-martial jurisdiction over a wide range of individuals who might not have otherwise been considered service members for purposes of personal jurisdiction. The amendment cuts to the heart of a number of controversial Court of Military Appeals decisions which had voided enlistments on a variety of grounds.[3]

Although the amendment appears to settle some jurisdictional issues, it also raises a number of new legal issues and practical problems. Some of these issues have been raised and decided before under other jurisdictional arguments. Others remain untested. Before addressing a variety of issues which counsel may expect to see litigated, we turn first to the statute itself.

The Amendment [4]

Article 2, U.C.M.J. was amended as follows:

(1) by inserting "(a)" before "The" at the beginning of such section; and

(2) by adding at the end thereof the following new subsections:

(b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section, and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.

(c) Notwithstanding any other provision of law, a person serving with an armed force who—

(1) submitted voluntarily to military authority;

(2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;

(3) received military pay or allowances; and

(4) performed military duties;

is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.[5]

The changes resulted from hearings conducted in 1978 and 1979 by the Senate Armed Services Committee on the continuing problem of recruiter misconduct. During its inquiry, the committee learned of the Court of Military Appeals' position on fraudulent enlistments. In the committee's report on the proposed amendments, the "serious" problem created for the military by those decisions was addressed. In language which clearly indicates the tenor of its intent, the committee stated:

> Several instances came to the committee's attention where accused military members raised the issue of recruiter malpractice after commission of an offense, succeeded in obtaining a ruling of no jurisdiction, and were thereupon returned to duty for a time (before administrative separation could be effected) completely immune from military discipline. This situ-

ation is made intolerable in the case of alleged recruiter malpractice by the fact that the burden of proof on the jurisdictional issue shifts to the government after being raised by the accused, forcing the government to prove that there was no recruiter malpractice many months or years after the fact, with the recruiter miles away or out of the service. The committee learned that in many instances accused military members were simply discharged after raising the defense because of the difficulty of affirmatively proving that the enlistment was valid, thereby escaping just punishment for their offenses.[6]

The proposed changes may be best characterized, as did the committee, as the *Grimley* provision (Subsection (b)) and the constructive enlistment provision (Subsection (c)).

Subsection (b) establishes criteria for a "valid" enlistment under Subsection (a) of Article 2.[7] If the individual possesses the "capacity to understand the significance of enlistment in the armed forces" and voluntarily enlists, that individual is considered amenable to jurisdiction. In proposing this amendment the committee intended to overrule the rule in *United States v. Russo*,[8] that an enlistment could be voided if a recruiter had intentionally effected a fraudulent enlistment. The amendment is not intended to condone recruiter misfeasance or malfeasance [9] but rather to reaffirm the Supreme Court's decision in *In re Grimley*.[10]

Subsection (c) codifies the doctrine of constructive enlistment: If for any reason there is an "invalid" enlistment the individual effects a constructive enlistment at the time the four criteria are satisfied—notwithstanding any statutory or regulatory disqualification.[11] According to the committee, this section overrules the "estoppel" theory which had in the past prevented the Government from relying on a constructive enlistment rationale when showing personal jurisdiction.[12] It also overrules those decisions which held that an uncured regulatory disqualification could prevent a constructive enlistment.[13]

Issues

The statutory changes to the litigation of personal jurisdiction will surely raise a multitude of questions and interpretations in the coming years—a bold challenge for the litigator. Some of the questions are predictable. Others are more subtle and may, as often happens in the area of personal jurisdiction, be absorbed by larger issues. What follows is a brief discussion of a variety of issues that counsel will probably see raised in personal jurisdiction litigation under the new amendment.

A. Retroactive Application.

One of the first questions which must be addressed is the possible retroactive effect of the amendment. There is no specific guidance on this point in the amendment itself or the published legislative history. Absent such specific intent, the law generally presumes only prospective application. The statute may nonetheless be applied retroactively if it is not *ex post facto*. Here, the amendment was intended to change jurisdictional rather than substantive law; it does not now make criminal what was once lawful. Another point is that the amendment was intended to codify long-standing principles of enlistment law.[4]

Although the discussion here does not address the myriad permutations of the retroactively question some general points for analysis purposes can be made. First, in analyzing the retroactively question three dates should be considered:

Effective date of amendment—9 November 1979;

Date of enlistment (subsection (b));

Date of constructive enlistment (subsection (c)).

If the amendment is considered wholly retroactive and applicable to all persons now on active duty, then the dates are of little, if any, import. However, a more conservative approach might be to address the retroactivity issue only after first determining whether the enlistment, before 9 November, was in fact void under the

Russo-Catlow rules. If it was merely voidable, then jurisdiction may still be based on recent case law predating the amendment and finding that voidable enlistments may serve as a valid jurisdictional base.

Assuming that the enlistment was void and consummated prior to 9 November, jurisdiction may possibly be based upon a finding of constructive enlistment after 9 November—the estoppel argument no longer being valid. To be on the safe side all other alternatives should be examined before relying upon retroactive effect to provide jurisdiction over a clearly void enlistment or constructive enlistment occurring prior to 9 November 1979.[5]

B. Does the Amendment Vest Jurisdiction Over Civilians?

The committee specifically stated that the new amendment was not intended to affect civilians or reservists not on active duty.[16] Rather, it was designed to reach "those persons whose intent it is to perform as members of the active armed forces and who meet the four statutory requirements." [17] Any attempts to read the amendment as applying to "civilians" would fly in the face of Supreme Court decisions which have severely limited court-martial jurisdiction over civilians.[18] Of interest, however, is the statement in the committee's report that Subsection (c) overrules *United States v. King*.[19] You will recall that King was considered by a majority of the members of the Court of Military Appeals to be an interloper not subject to court-martial jurisdiction. King had not executed an enlistment contract nor had he taken any oaths. He simply obtained forged travel orders, donned a uniform, and served for several months with a unit in Germany before the Government discovered his charade and court-martialed him.[20] The amendment then arguably touches those individuals who for one reason or another have not executed a formal agreement or oath to serve with the armed forces.[21]

This broad application need not necessarily lead to the conclusion that Congress intends the amendment to include civilians. As already noted, the Committee Report specifically exempts civilians.[22] And the wording of Subsection (c) includes only persons "serving" with the armed forces. The provision turns on "actual service" or "de facto status"—the two terms sometimes used interchangeably with "constructive enlistment" by the courts as a basis for jurisdiction.[23] Practically, the *King* scenario occurs only rarely but points counsel to the intent of Congress in those situations where an enlistment agreement cannot be found or there is no proof that an oath was given; jurisdiction may still vest when Subsection (c)'s criteria can be shown.

C. Competency to Enlist: Statutory and Regulatory Disqualifications.

Has Congress in amending Article 2 indicated that it will accept a lower standard or quality for competency to enlist? Is a service member under 17 years of age at time of trial now amenable to jurisdiction? What about Felons? Aliens? Can a service member who suffers from dyslexia or drug addiction be subject to court-martial jurisdiction under the amendment?

Congress could certainly exercise its powers and indicate that no longer would there be any statutory qualifications to enlist.[24] But it did not do so in the amendment and there is nothing in the legislative history to indicate that Congress was willing to completely abandon a minimum standard of competency or capacity to enlist.[25] What then of those not statutorily competent to enlist? Although statutory criteria are only specifically addressed in Subsection (c), it seems safe to assume that jurisdiction under either (b) or (c) will vest only over those individuals statutorily "competent" to enlist. If a statutory defect affecting capacity exists at the time of trial then jurisdiction will not vest under either Subsection (b) or (c).[26] Thus, a sixteen-year old service member is not amenable to trial until reaching the magic age of seventeen. Statutory restrictions on felons, deserters, and those not U.S. citizens do not touch "competency" or "capacity" to enlist and thus would not invalidate jurisdiction under either (b) or (c).[27] The amendment, however, does vest jurisdiction over enlistments where the individual lacked

capacity at the inception but the defect was cured before trial; there is really nothing new here. Absent estoppel, the Government has generally been allowed to show a subsequent change of status under the theory of constructive enlistment.[28]

What about those service members serving with a regulatory disqualification? The amendment does make some changes here. Under either Subsection (b) or (c) regulatory defects not affecting capacity do not void jurisdiction.[29] The enlistment may of course be voided by the government because of the defect but that option is not available to the service member still on active duty at the time of trial (more on this later). If the regulatory defect touches "capacity" or "voluntariness' then arguably it may be treated in the same manner as a statutory defect amounting to a lack of capacity—both with regard to Subsection (b) and (c).[30] A service member with dyslexia or drug addiction could be amenable to jurisdiction under Subsection (b) and certainly amenable under Subsection (c).[31] An enlistment resulting from the "go to Army or go to jail" routine may be involuntary under Subsection (b) but later sufficient for court-martial jurisdiction under Subsection (c).[32]

D. Recruiter Misconduct.

The statutory change was intended to overrule *Russo* and its progeny.[33] Recruiter misconduct—even an intentional violation of Article 84, UCMJ—will not in itself void an enlistment. But recruiter misconduct which affects either the individual's "capacity to understand the significance of enlisting" or "submit voluntarily to military authority" may still initially (and indirectly) void an enlistment.

For example, where a recruiter successfully and intentionally paints a false picture of military service for the easily deceived recruit, the Government's ability to rely on Subsection (b) for jurisdiction may be limited. Whether that recruit continued to be deceived would then raise additional questions regarding the voluntary submission requirement of Subsection (c). An accused's statement that he was misled by a fast-talking recruiter will no doubt continue to be raised. But, whether after actually serving on active duty the accused can raise serious questions about his "involuntary" service is a different matter.[34] Continued *Catlow*-type protestations by a recruit may still defeat jurisdiction under both Subsections (b) and (c).[35]

Although emphasis is usually placed upon "recruiter" misconduct, litigation has sometimes centered on "government" misconduct.[36] The government will probably still be precluded from establishing jurisdiction where the facts support the conclusion that the individual, because of Government actions or inactions, never voluntarily submitted to military authority. What of the deterrent effect of *Russo?* Whether the *Russo* decision had the desired "salutory" effect [37] of reducing recruiter misconduct is debatable.[38] The decision certainly served as a potential club to be used by recruiting officials; yet continued recruiting pressures reduced its effectiveness. The risk of an enlistment later being voided and the defect traced to a specific recruiter was simply not sufficient as a deterrent. Important to note here is that Congress by providing jurisdiction over fraudulent enlistees is not condoning recruiter malpractice.[39]

E. Public Policy.

The amendments to Article 2 represent Congress' position on public policy. The committee was disturbed by the doctrines and problems spawned by the *Catlow-Russo* decisions and so stated:

> The committee strongly believes that these doctrines serve no useful purpose, and severely undermine discipline and command authority. No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result. That policy makes a mockery of the military justice system in the eyes of those who serve in the military services.[40]

Ironically, the same theme was expressed by Judge Cook in *United States v. Torres.*[41] Judge

Cook concurred in the conclusion that Torres was not subject to court-martial jurisdiction because of intentional recruiter misconduct but noted that he could no longer support the *Russo* public policy argument:

> Plainly, the *Russo* doctrine has been used to destroy the public policy it was designed to promote. As the public policy considerations perceived in *Russo* have been perverted, not promoted by its sanction, I believe the rule it imposed must be abandoned.[42].

Is public policy still a consideration in litigating personal jurisdiction questions? Yes, but not in the image of *Russo*. The amendment now expresses the public policy that individuals may not escape punishment because of the misconduct of a recruiter. But that policy exists only where the service member is competent and voluntarily serves. The amendment should not serve as a signal to recruiters that anything goes.

F. Effect of Notice to Government of Defective Enlistment.

One of the points made in the Court of Military Appeals decisions of *United States v. Valadez* [43] and *United States v. Wagner* [44] was that notice to the Government of a defective enlistment could operate on behalf of an accused to void jurisdiction. The amendment includes language in Subsection (c) which provides that jurisdiction under that provision continues until the period of service has been "terminated in accordance with law or regulations promulgated by the Secretary concerned." [45] This is consistent with existing law which indicates that status continues until discharge.[46] But, it goes further. It in effect negates any language in *Valadez* and *Wagner* which would defeat personal jurisdiction once an individual has given notice to the Government prior to the commission of an offense. In theory this provision provides jurisdiction over those persons who are in the process of being discharged for any variety of reasons, including a defective enlistment, when they commit an offense.[47]

G. Establishing Jurisdiction.

The amendment changes little for the government's overall burden of establishing that an accused is subject to court-martial jurisdiction.[48] The *Alef* [49] pleading burden remains. And it is safe to say that the requisite quantum of proof will remain the same.[50] However, some of the practical problems normally associated with litigating the issue should vanish. In the large majority of the cases, the recruiter will not be called; whether the recruiter assisted the recruit in concealing a defect or passing a test will be irrelevant.

When the defense raises the spectre of a defective enlistment the Government may meet that challenge in several ways. First, the Government could establish a prima facie case by introducing the enlistment contract itself which evidences directly or indirectly the elements of Subsection (b). Although the contractual aspects of the enlistment appear to be neutralized by the amendment, the agreement and oath establish a voluntary change of status.[51]

Secondly, the Government could of course establish jurisdiction under Subsection (b) with live witnesses but that would probably require the presence of the recruiter or other parties who were present when the enlistment was entered—a practice now fraught with problems.[52]

A more desirable course might be to simply assume for the sake of argument that the accused's enlistment was initially invalid (for any reason) and proceed with proof under the constructive enlistment provision of Subsection (c). Local witnesses and unit records would normally suffice to show that the accused is *now* subject to court-martial jurisdiction.[53] It is here that the constructive enlistment decisions serve as a necessary reference for counsel. In the past few years counsel were often not concerned with establishing constructive enlistments. Most personal jurisdiction cases involved some form of recruiter misconduct which either voided the enlistment under *Russo* or estopped the government from arguing constructive enlistments under *United States v. Brown*.[54] Consequently, the large body of law on constructive

enlistments often remained dormant.[55] The amendment will certainly change that.

V. Conclusion.

At first blush, the amendments to Article 2 moot most of the personal jurisdiction issues raised by the *Catlow*,[56] *Russo*,[57] and *Brown*[58] decisions. Closer analysis, however, leads to the safer conclusion that some issues remain and newer, perhaps more perplexing, questions are raised. Another conservative conclusion is that the foregoing issues only scratch the surface. The Committee's report—the legislative intent if you will—is instructive.[59] But the actual, practical, effect of the amendments will be determined in the future as the statute is litigated and tested on appeal. In summary, it might be helpful to set out a two-step approach to analyzing personal jurisdiction questions under the recent amendment:

Was the enlistment invalid at its inception? If the accused lacked "capacity" to enlist or if the enlistment was involuntary then jurisdiction may not be based on Subsection (b). Recruiter or government misconduct in itself will not void the enlistment. Nor will statutory or regulatory defects not affecting the accused's "capacity" invalidate jurisdiction.

If the enlistment was initially invalid, did the accused at some point, prior to trial, effect a constructive enlistment? That is, notwithstanding any regulatory or statutory defect, were the four criteria of Subsection (c) met? If so, the jurisdiction exists over the accused.

For illustration, the two-step process in assessing jurisdiction under the amendment can be applied to several scenerios:

Scenerio 1: Private Jones was sixteen when he enlisted for three years; he lied about his age and presented obviously forged documents to support his sham. The recruiter noticed the fraud, joked about it with Jones and then completed the paperwork. Jones told his commanding officer of the defective enlistment but the latter ignored Jones' statements. Jones turned seventeen three (3) weeks before committing the charged offense.

Analysis: The enlistment was invalid at its inception; Jones, age sixteen, lacked the capacity to enlist.[60] Therefore, jurisdiction should not be based on Subsection (b). The recruiter's misconduct does not void the enlistment nor does commanding officer's inaction bar jurisdiction under Subsection (c). Whether Jones in a period of three weeks established a constructive enlistment will turn on a further step by step analysis of the four criteria in Subsection (c).[61]

Scenerio 2: PFC Smith (age eighteen) enlisted in lieu of going to jail—on the "advice" of the presiding civilian judge. When he filled out the enlistment paperwork he lied, without the assistance of the recruiter, about prior drug use and two arrests. He served for one year, successfully completed the training cycles, received pay, promotions, and excellent performance ratings. On several occasions he mentioned to his platoon sergeant a desire to re-enlist.

Analysis: Jurisdiction should not be based on Subsection (b) due to the initial lack of voluntariness. The probable violations of recruiting criteria do not void jurisdiction. Jurisdiction may, however, be based upon Subsection (c); Smith has apparently fullfilled the four criteria.[62]

Scenario 3: Private Snats, a twice-convicted felon voluntarily enlisted with the assistance of recruiter misconduct. Once on active duty, however, he protested his status continuously. His company commander was in the process of administratively discharging him (defective enlistment) when Snats was caught selling heroin.

Analysis: Snats' enlistment was probably valid under Subsection (b). He voluntarily enlisted and probably understood the significance of enlisting. His post-entry protestations might negate finding jurisdiction under Subsection (c) if Subsection (b) is determined to be not applicable.[63] The commanding officer's decision

to administratively eliminate Snats does not bar jurisdiction; Snats' enlistment may indeed be defective under the regulation, and still serve as basis for jurisdiction under Subsection (b).[64]

The foregoing scenerios present a cross-section of some of the more commonly encountered jurisdiction problems. The problems will remain but the solutions should change with the amendment to Article 2.

Whither *Russo, Catlow,* and *Brown?* The statutory change indicates that *Russo* and *Brown* have been neutralized. But the voluntariness implications of *Catlow* remain.[65] If the statute effects the desired changes in personal jurisdiction litigation, the military justice clock will be set back to a time when litigating jurisdiction issues was simpler—and perhaps more certain. Congress has exercised its constitutional duty. What the courts will do with the amendment is yet to be seen.

Footnotes

[1] United States v. Barraza, 5 M.J. 230, 233 (C.M.A. 1978) (Fletcher, C.J.). Chief Judge Fletcher in writing this language was not addressing the pure enlistment questions of personal jurisdiction but was rather addressing a fact situation involving an involuntary activation of a reservist—a "lazy" reservist —who had not raised deficiencies in the government's processing of his activation until after he was charged. The quote, although appropos, should not be construed as indicating Judge Fletcher's approval of the amendment to Article 2. In testimony before the House Armed Services Committee, he strongly opposed any attempts to overrule the *Russo* doctrine and its progeny. *See* Army Times, June 25, 1979, at 8. The amendment would in his estimation "have the effect of sweeping all fraudulent enlistments under the table." *Id.* He was joined in opposition to the amendment by Mr. Eugene Fidell who also testified before the House Armed Services Committee. Those supporting the measure included the Service Judge Advocates General, Judge Cook, who personally offered an alternate amendment (*see* note 42, *infra*) and Professor Robinson Everett.

[2] *See e.g.*, U.S. CONST. art. I § 8, cl 11. (power to declare war); *id. cl.* 12 (power to raise and support armies); *id.* cl. 14 (power to make rules for the government and regulation of the land and naval forces).

[3] Little would be gained here by relitigating the merits of limiting personal jurisdiction over those serving under a clouded enlistment. The controversy until lately existed primarily among those concerned with the day-to-day problems caused by the decisions. But in the past year the decisions took on an added dimension as Congress and the press took a long look at the situation. The Army Times, in an editorial titled "Court Malpractice" noted, *iner alia,* the following:

> The Senate has passed a provision which would assure court-martial jurisdiction over [fraudulent enlistments]. But Court of Military Appeals Chief Judge Albert B. Fletcher Jr. has argued that the change would "have the effect of sweeping all fraudulent enlistments under the table.
>
> "It would seem to me that an innocent victim trapped by the government should not fall under the jurisdiction of a military court-martial," he said. But another member of the three-judge court broke ranks in testimony before the subcommittee. Judge William H. Cook said he supported efforts to nullify the *Catlow-Russo* precedent.
>
> So do we, provided that the final provision overturning the *Russo* rule is drafted in such a way as to protect people who are actually the victims of recruiter malpractice. A soldier, for example, might have to raise the malpractice issue within a short period after entry in the service or forfeit the right to raise the argument later.
>
> We might have thought a tad more of the CMA decision had it carried its argument to its logical, legal conclusion. That is, that because the "soldier" really wasn't in the service, the Army had no authority to pay, feed, quarter or clothe him. Maybe that's silly, but so is *Catlow-Russo.*

Army Times, July 23, 1979.

[4] The amendment was passed as a part of the Defense Authorization Act for FY 1980 (S. 428). Pub. L. No. 96-107 (9 Nov 1979) Additional amendments were made to Article 36, U.C.M.J. to clarify the President's authority to promulgate rules of practice and procedure before courts-martial.

[5] The amendment's language represents the Senate's original version. *See Congressional Record,* S. 428, 96th Cong, 1st Sess., 125 CONG. REC. S 7272 (1979). The House receded during conference to the Senate's language. *See Congressional Record,* 96th Cong, 1st Session, 125 CONG. REC. H 9319 (1979). *See* note 6 *supra.*

[6] Senate Report 96-197 Defense Authorization Act, 1980 (S. 428) at 121 [hereinafter cited as Report]. The pertinent portions of the Report are included as an Appendix to this article. In commenting on S. 428, Senator Nunn noted:

> On [the subject of military discipline] the committee approved an amendment which we feel will improve military discipline.
>
> The Court of Military Appeals has ruled, under the so-called "Catlow-Russo" decisions, that where there is a defect in the service member's enlistment, resulting from recruiter misconduct or some other factor, that defect deprives the court-martial of jurisdiction to try the accused for offenses committed in the military. The effect is to allow persons who commit offenses in the military to go without punishment. This problem has been highlighted by all four service chiefs. The committee amendment provides that a person becomes subject to military justice by taking the Oath of Enlistment or by voluntarily accepting military duties and military pay. This is not a provision to condone recruiter malpractice but simply provides that those who commit crimes in the military should be subject to military justice. *Congressional Record*, 96th Cong, 1st Session, 125 CONG REC, S 7290 (1979).

And in its report to the House, the Conference Committee on S. 428 stated:

> The Senate bill contained a provision (sec. 801) intended to improve military discipline by limiting the right of an accused to raise defects in the enlistment process to defeat court-martial jurisdiction, and to clarify the President's authority to issue a manual of procedure not only for trial procedures, but pre-trial and post-trial procedures as well.
>
> The House amendment has no similar provision.
>
> The House recedes.
>
> The House conferees were reluctant to take a step which might be misinterpreted as providing further encouragement to an already serious recruiting malpractice problem. However, it is inappropriate to addess the issue of malpractice in a court-martial proceeding.
>
> The conferees agree that the current management technique of using recruiting quotas has increased the likelihood of recruiting malpractice. The Secretary of Defense is urged to review the management of recruiting in the military services and to consider an alternative approach to the current quota system.
>
> The conferees have also agreed that a more effective administrative process to permit enlistees to raise questions of the validity of their enlistment is necessary. The conferees expect the Secretaries of each of the services to establish an administrative process that will provide each enlistee a voluntary opportunity to raise any improper matters in his or her enlistment, as well as permit service management to uncover recruiting malpractice. The general framework of this process shall permit an enlistee at the end of his basic training period, or at a similarly appropriate point, the opportunity to raise such matters.
>
> The service secretaries shall report back to each of the Committees on Armed Services by December 31, 1979 on the process that will be established to uncover recruiting malpractice.

Congressional Record, 96th Cong, 1st Session, 125, CONG. REC. M. 9319 (1979).

[7] *See* note 4 *supra*.

[8] 1 M.J. 134 (C.M.A. 1975).

[9] The committee specifically noted that the amendment was not intended to "suggest that recruiter malpractice be tolerated, but reliance should be placed on prosecution under Article 83 and 84, and on administrative reforms to solve [the problem of recruiter malpractice]." Report *supra* note 6 at 122.

[10] 137 U.S. 147 (1890).

[11] *See* notes 25-29 *infra* and accompanying text.

[12] The estoppel theory found its genesis in *United States v. Brown*, 23 C.M.A. 162, 48 C.M.R. 778 (1974), gained momentum in *United States v. Russo*, 1 M.J. 134 (C.M.A. 1975) and peaked in *United States v. Harrison*, 5 M.J. 476 (C.M.A. 1978). The estoppel doctrine prevented the Government from relying on a constructive enlistment where it had acted unfairly in enlisting an individual. The committee intended to overrule those portions of *Brown, Harrison*, and *Russo* which acted to estop the Government. *See* Report *supra* note 6 at 122.

[13] The amendment was also intended to "overrule that portion of *United States v. Valadez*, 5 M.J. 470 (C.M.A. 1978) which stated that an uncured regulatory defect not amounting to a lack of capacity or voluntariness prevented application of the doctrine of constructive enlistment." Report *supra* note 6 at 122.

[14] Report *supra* note 6 at 122. *See also* Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 MIL. L. REV 1, 56-60 (1977). In Post v. United States, 161 U.S. 583 (1896), the Supreme Court distinguished between statutes affecting substantive law, procedure, and jurisdiction, the latter two not considered under

the *ex post facto* proscription. *Cf.* Putty v. United States, 220 F.2d 473 (9th Cir. 1955) cert. den. 350 U.S. 821 (1955) (change in court's jurisdiction was *ex post facto* as a defendant).

[15] With just a pinch of imagination one can readily see the potential for, at least in theory, a whole host of new issues in litigating personal jurisdiction issues. The Department of the Army position is that the amendment is permissibly retroactive to all persons now on active duty. DA message 131800Z (13 Nov. 1979). Preliminary indications are that the Navy will take the same position. Any attempts of course to "retry" or relitigate an earlier finding of no jurisdiction over an individual who is awaiting a discharge would be barred by either law of the case or *res judicata* principles. See O'Donnell, *Public Policy and Private Peace—The Finality of a Judicial Determination,* 22 MIL. L. REV. 57 (1963).

[16] Report *supra* note 6 at 122.

[17] *Id.*

[18] *See e.g.,* United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955) (no jurisdiction over discharged soldier); Reid v. Covert, 354 U.S. 1 (1957) (no jurisdiction over civilian dependents accompanying armed forces overseas during peacetime); and Grisham v. Hagan, 361 U.S. 278 (1960) (no jurisdiction over civilian employees in peacetime).

[19] 11 C.M.A. 19, 28 C.M.R. 243 (1959).

[20] King, an E-1, had received an undesirable discharge in February 1958. Only three days later he obtained forged orders at Fort Ord authorizing shipment to Europe via Fort Dix. He received pay and allowances from March 1958 to July 1958. He was charged with fraudulent enlistment, absence without leave, failure to obey a lawful order, resisting apprehension, forgery, and possession of a false pass. The majority said that the Army was "just the victim of a crime committed by a civilian," 28 C.M.R. at 249. Judge Quinn dissented and noted that more than a "mere passing masquerade by the accused" had occurred. He felt that King had procured an *actual entry* into the service.

[22] Report *supra* note 6 at 122.

[23] For example, in *In re* McVey the court noted that the petitioner was a *de facto* soldier because he had voluntarily assumed obligations and had attempted to secure the rights of a serviceman. And in United States v. Julian, 45 C.M.R. 876 (N.C.M.R. 1971) the court rejected the argument that the accused was not subject to court-martial jurisdiction because he had been intoxicated when he enlisted. The accused was subject to jurisdiction because he was in "actual" service. Neither decision however, discussed "constructive enlistment" which has normally been associated with implied contracts. *See King, supra* note 20 and accompanying text.

[24] *See e.g.,* United States v. Williams, 302 U.S. 46 (1937) where the Supreme Court recognized the authority of Congress to determine who was eligible to enlist.

[25] 10 U.S.C. § 504 (1970) provides:

> No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the secretary concerned may authorize exceptions, in meretorious cases for enlistment of deserters and persons convicted of felonies.

Failure to meet all statutory qualifications does not necessarily render one incompetent to enlist. It would be safe to say that Congress intended to provide for jurisdiction over those meeting the age and mental requirements—those requirements mentioned in *Grimley.* See also United States v. Wagner, 5 M.J. 461 (C.M.A. 1978). Note that Subsection (b) only requires a voluntary enlistment by "any person who has the capacity to understand the significance of enlisting. . . ." Therefore, a felon who enlists could be subject to jurisdiction under Subsection (b) and subsection (c). And although 10 U.S.C. § 3253 (1970) requires that only U.S. citizens (or those lawfully admitted to the United States for permanent residence) may enlist, an alien could be subject to jurisdiction under both subsections (b) and (c). Part of problem in analyzing the effect of the amendment is adjusting to the proposition that jurisdiction under the new Article 2, UCMJ is not always linked with what in the past was considered to be a valid enlistment.

[26] This conclusion is supported by the Committee's Report which specifically mentions the situation involving an individual not meeting the minimum age requirements at the time of enlistment but who later successfully enters into a constructive enlistment. Report *supra* note 6 at 123.

[27] *Id.* Apparently those under the current statutory age of seventeen do not possess the capacity to "understand" the significance of enlisting in the armed forces under Subsection (b). Arguably felons, deserters and those not U.S. citizens can understand the significance of enlisting. Historically, for example, lack of citizenship did not always defeat jurisdiction. *See e.g., Ex parte* Beaver, 271 F. 493 (N.D. Ohio 1921); *Ex parte* Dostal, 243 F. 664 (N.D. Ohio 1917).

[28] *See e.g.,* United States v. Harrison, 5 M.J. 476 (C.M.A. 1978).

[29] As with the statutory defects, the *Grimley* rationale adopted by Congress seems to apply only to those

regulatory controls which touch the individuals "capacity" and render the individual *non sui generis*. *See also* United States v. Wagner, 5 M.J. 461 (C.M.A. 1978). The Report mentions only two requirements for a valid enlistment under Subsection (b): capacity and voluntariness. The criteria of Subsection (c) do not mention regulatory qualifications. Report *supra* note 6 at 122.

[30] Id.

[31] Dyslexia and/or drug addiction could conceivably defeat jurisdiction under either Subsection (b) or (c) if such defects continually rendered the individual *non sui generis* or prevented formation of a voluntary enlistment. As a practical matter in only a rare case would either of those regulatory defects prevent a constructive enlistment under Subsection (c).

[32] This hypothetical is specifically mentioned in the Report *supra* note 6 at 123. But note that if the choice of "army or jail" was prompted by the accused, his family, or counsel then the resulting enlistment will not necessarily be "involuntary." *See* United States v. Lightfoot, 4 M.J. 262 (CMA 1978); United States v. Wagner, 5 M.J. 461 (CMA 1978).

[33] *See* note 8 *supra* and accompanying text.

[34] In the past if the Government could not satisfactorily establish the absence of recruiter misconduct, it failed on two counts: The enlistment was usually considered void *ab initio* under *Russo* and the Government could not show formation of a constructive enlistment. Now, recruiter misconduct is, in itself, a neutral factor. Assuming that the Government cannot successfully rebut allegations of the deceived, innocent recruit, in all likelihood the Government will be able to show that at some point before trial, the accused voluntarily served and thus is subject to jurisdiction under Subsection (c). A recent Navy Court of Military Review decision emphasizes the potential problems. In United States v. Hurd, M.J. —— (N.C.M.R. 25 Sep 1979) the accused was deceived; he unsuccessfully protested, and then served for one and one-half years. The court held the enlistment "involuntary" and estopped the Government from arguing constructive enlistment because of its inaction in correcting a recruiting abuse. *See also* notes 51 and 63 *infra*. Under the amendment, jurisdiction could be established over *Hurd*-like cases under subsection (c).

[35] The "continued—protestation" point was specifically made in the Report *supra* note 6 at 123. Note that in *Catlow*, the accused registered his protests through, among other methods, repeated AWOL's. Will a one-time verbal protest work? Probably not—especially if the length of service covers an extended period of time.

[36] *See e.g.*, United States v. Marshal, 3 M.J. 612 (N.C.M.R. 1977), where the actions/inactions of a clerk in a Recruit Training Regiment were the equivalent of Government misconduct. *See also* United States v. Brown, 23 C.M.A. 162, 48 C.M.R. 778 (1974) where company commander had not acted properly after notice that accused was underaged.

[37] United States v. Russo, 1 M.J. 134 (C.M.A. 1975) at 136.

[38] See note 42, *infra* and accompanying text. The amendment was passed by Congress amidst wide-spread recruiter misconduct investigations, which has resulted in almost three hundred individuals being relieved from recruiting duty.

[39] Report *supra* note 6 at 122. *See also* the Conference Committee Report and Senator Nunn's remarks at note 6 *supra*.

[40] Report *supra* note 6 at 121. The Conference Committee Report, also note 6 *supra*, was to same effect. Historically, public policy considerations generally weighed in favor of the Government. *See Enlistment Contract, supra* note 14 at 46-49.

[41] 7 M.J. 102 (C.M.A. 1979).

[42] 7 M.J. at 107. Judge Cook's position was based on his "personal" observations of the *Russo*-related problems. He further noted that his observations have been confirmed by the "Army Chief of Staff and other senior officials before the Subcommittee on Manpower and Personnel, Senate Armed Services Committee." Id.

[43] 5 M.J. 470 (C.M.A. 1978).

[44] 5 M.J. 461 (C.M.A. 1978). Both *Valadez* and *Wagner* were discussed in *Wagner, Valadez,* and *Harrison*: A *Definitive Enlistment Trilogy?*, *The Army Lawyer*, Jan. 1979 at 4.

[45] Article 2(c), U.C.M.J.

[46] *See* United States v. Hutchins, 4 M.J. 190 (C.M.A. 1978).

[47] Recall that the Congressional intent was to avoid the situations where individuals could be immune from prosecution before a discharge would be executed. *See* note 6, *supra* and accompanying text.

[48] *See e.g.*, Runkle v. United States, 122 U.S. 543 (1887); United States v. Barrett, 1 M.J. 74 (C.M.A. 1977).

[49] *See* United States v. Alef, 3 M.J. 414 (C.M.A. 1977).

[50] *See* United States v. Bailey, 6 M.J. 965 (N.C.M.R. 1979) where the Navy Court of Military Review in an *en banc* decision addressed procedure and burden

of proof questions. If the accused's status is not an underlying element of the charged offense (e.g. AWOL, desertion) then the question of personal jurisdiction is decided by the military judge, as an interlocutory matter, applying a standard of proponderance of the evidence. However, if status is an underlying element, the issue is decided first by the judge using a proponderance of the evidence standard and then by the members using a beyond a reasonable doubt standard.

[51] The enlistment contract normally includes a statement of understanding between the parties: recruit and Government. The actual contractual facets of the enlistment are not essential to determining jurisdiction. Military courts have traditionally emphasized that jurisdiction is based on status, not contract. In recent years more "contractual" language found its way into enlistment decisions. *See e.g.*, United States v. Russo, 1 M.J. 134, 137 (C.M.A. 1975) (common law contract principles applied).

Will a breach of contract by the Government defeat jurisdiction? No. Applying the *Grimley* rationale, now codified, a breach of contract will not relieve the accused from court-martial jurisdiction. *See* United States v. Bell, 48 C.M.R. 572 (A.F.C.M.R. 1974) (breach of contract argument rejected as defense to AWOL). *See also* Dickenson v. Davis, 245 F.2d 317 (10th Cir. 1957) The accused's charge of breach of contract may impact, however, on the issue of "voluntariness," essential to finding jurisdiction under either Subsection (b) or (c). *See e.g.*, United States v. Hurd, —— M.J. —— (N.C.M.R. 25 Sep 79) where the court found no jurisdiction over service member whose enlistment contract had been changed, without his knowledge, to reflect a different training specialty. He came on active duty after officially and unsuccessfully protesting several times. The Court said that his enlistment was involuntary and that Government inaction estopped it from showing that he had entered a constructive enlistment in one and one-half years of service. Under the amendment the Government would not be estopped. This case clearly points out that strong equities often exist in favor of the accused and that the Government must continue to ferret out irregular enlistment practices. *See* note 6 *supra* for Conference Committee Report to that effect. Defense counsel faced with this problem should urge that simply accepting pay, performing duties, etc., does not establish voluntary service. The longer the period of service, the tougher the task of showing involuntary service.

[52] *See* note 6 *supra* and accompanying text.

[53] If jurisdiction is to be grounded or Subsection (c) under a constructive enlistment, then the validity of the enlistment, *ab initio* is of secondary concern. Using local resources, i.e., the accused's commander, NCO's, and Military Personnel Records Jacket (MPRJ) should simplify matters for the Government.

[54] 23 C.M.A. 162, 48 C.M.R. 778 (1974).

[55] *See e.g.*, United States v. Wagner, 3 M.J. 898 (A.C.M.R. 1977) *aff'd* 5 M.J. 461 (C.M.A. 1978) (discussion of constructive enlistment); *See also Constructive Enlistments: Alive and Well*, The Army Lawyer, Nov. 19767 at 6.

[56] 23 C.M.A. 142, 48 C.M.R. 758 (1974).

[57] 1 M.J. 134 (C.M.A. 1975).

[58] 23 C.M.A. 162, 48 C.M.R. 778 (1974).

[59] *See Appendix* (Extract of Senate Report 96-197) and note 6 *supra* (Conference Committee Report).

[60] *See* notes 26, 27 *supra* and accompanying text.

[61] The problem is close. Whether three weeks is sufficient to establish a constructive enlistment could go either way. Five (5) days service was held to be insufficient in United States v. Williams, 39 C.M.R. 471 (A.B.R. 1968).

[62] This scenerio presents elements of probably the most common enlistment problem—a regulatory deficiency coupled with recruiter misconduct followed by a constructive enlistment.

[63] This scenerio might arise in situations approximating those of the recent decision in *Hurd, supra* notes, 34, 51. Special care must be given to these types of not cases. Although recruiter misconduct may no longer be the key issue in litigating jurisdiction, the related problems of changed training requirements, assignments, and other enlistment promises should be expected. The mere breach of the enlistment contract should not defeat jurisdiction. However, where the Government has obviously deceived the recruit, as in *Hurd*, jurisdiction will probably rest on subsection (c) only if the servicemember actually served voluntarily after discovering the deceit. Note that in *Hurd* it was apparent that the designated training blank on the enlistment form had been changed from hospitalman (H——) to mess management (MS). To reach its result, the Court in effect held that Hurd's oath and enry into the delayed entry program was voided by the discovery, 1 month later, that something was amiss.

Note that if the enlistment is valid under subsection (b), that is, it was voluntary and the individual had the capacity to enlist, then subsequent "involuntary" service will *not* defeat jurisdiction. Superficially, however, involuntary service casts questions on the voluntariness of the initial entry onto active duty.

[64] *See* notes 6, 46 *supra*.

[65] *See* note 32, *supra* and accompanying text.